No. 126, Original

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA
and STATE OF COLORADO,

Defendants.

COLORADO'S REPLY IN OPPOSITION TO KANSAS' EXCEPTIONS

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STATEMENT

Special Master Kayatta found the States clearly did not intend to treat consumption of any material amount of imported water as if it were the consumption of virgin water supply. He found further that the current Republican River Compact Administration ("RRCA") Accounting Procedures ("Accounting Procedures") treat consumption of material amounts of imported water under some circumstances as if it were consumption of virgin water supply. Therefore, he recommends the Court order the Accounting Procedures reformed to correct the erroneous treatment of imported water. Kansas objects to that recommendation. Kansas argues there was no mutual mistake worthy of reformation and that the existing Accounting Procedures contain the States' deliberate agreement on "how to treat imported water in determining whether Nebraska has complied with its Compact obligations." Kansas Br. at 13.

Having determined Nebraska used more water than its allocation under the Compact, the Special Master recommends a monetary award in the amount of $5.5 million. Report at 179. That amount represents an award for the full amount of Kansas' loss ($3.7 million), plus an additional amount of $1.8 million. *Id.* The additional amount represents a portion of the amount by which Nebraska's gain exceeds Kansas' loss. *Id.* Kansas now asks this Court to award Kansas $11.1 million beyond its loss.

During hearings before the Special Master, Kansas sought various forms of injunctive relief. It asked the Special Master for an order enjoining further violations, an order shutting down 302,000 acres of land irrigated by groundwater pumping, "pre-set sanctions" for future violations, and appointment of a River Master. Report at 180. The Special Master recommends this Court deny each of Kansas' requests. Report at 180-186. Kansas now objects to the Special Master's recommendation.

Colorado opposes Kansas' exceptions in their entirety.

ARGUMENT

A. Kansas does not challenge the Special Master's finding that the Accounting Procedures treat Imported Water Supply as if it were virgin water supply from within the Republican River Basin.

As with nearly all the other issues in this case, the Special Master gave careful consideration to Nebraska's claim that the existing Accounting Procedures mistakenly charge Nebraska for consuming water imported from the Platte River Basin. Report at 32-37. The Report cites ample evidence in support of the Special Master's finding that "the current Accounting Procedures do sometimes treat the consumption of some imported water as if it were the consumption of the virgin water supply of the Basin." Report at 36. The Special Master finds that in 2006,

the amount of Platte River water counted as Computed Beneficial Consumptive Use ("CBCU") was 7,797 acre-feet. Report at 37.

Kansas does not challenge these findings. Instead, Kansas argues that the States agreed to charge Nebraska for consuming imported water. Kansas Br. at 27-28. However, this argument ignores the plain language of the States' Final Settlement Stipulation ("FSS"), and other evidence in the record including the testimony and reports of its own witnesses.

B. The plain language of the Compact and Final Settlement Stipulation, as well as Special Master McKusick's findings prove the States did not intend charge Nebraska for consuming imported water under the Compact.

Special Master Kayatta thoughtfully analyzed how the Republican River Compact ("Compact") allocates the virgin water supply of the Republican River Basin. Republican River Compact art. III; Report at 23-24. The Special Master notes that "[a]ll parties agree that the virgin water supply of the Republican River Basin does not include water that finds its way into the Basin as a result of man-made diversions from the Platte River Basin." Report at 15. The FSS refers to this water as "Imported Water Supply." FSS § II. Imported Water Supply is not subject to allocation under the Compact since it is not virgin water supply. *See* Republican River Compact art. III ("The specific allocations in acre-feet

hereinafter made to each state are derived from the computed average annual virgin water supply. ").

Kansas does not challenge these conclusions. Instead, Kansas argues that the States deliberately agreed to charge Nebraska for consuming Imported Water Supply when they negotiated the Accounting Procedures. Kansas Br. at 27-28. Kansas' argument, however, eviscerates the plain meaning of the Compact and the FSS, and fundamentally changes Nebraska's rights and obligations under the Compact.

First, Kansas' argument ignores several explicit provisions in the FSS that clearly demonstrate the States' agreement to *not* charge Nebraska for consuming Imported Water Supply. For example, Kansas' argument disregards the States' agreement that "Beneficial Consumptive Use of Imported Water Supply shall not count as Computed Beneficial Consumptive Use or Virgin Water Supply." FSS at § IV.F. Their argument further overlooks the definition of Imported Water Supply Credit as "a credit/offset against the Computed Beneficial Consumptive Use of that States' Allocation." FSS § II.

Second, Kansas' argument ignores the findings of Special Master McKusick who oversaw negotiation of the FSS, Accounting Procedures, and RRCA Groundwater Model and ultimately recommended their approval to this Court. Special Master Kayatta carefully considered Special Master McKusick's findings when he determined the States agreed that no State should be charged for consuming Imported Water Supply.

Report at 7-9; 25. For example, he quotes Special Master McKusick's finding that "the aim of the Accounting Procedures was to 'implement the principles of the Final Settlement Stipulation and to understand with greater precision how water in the Basin is being used and how it might be used more efficiently.'" Report at 25 (quoting Second Report of the Special Master at 47-48, *Kansas v. Nebraska*, No. 126 Orig. (Apr. 15, 2003) ("McKusick Second Report"). The Report also quotes Special Master McKusick's finding that the FSS resolves the issue of Imported Water Supply "by providing that imported water will not count as computed beneficial consumptive use or as virgin water supply." Report at 25 (quoting McKusick Second Report at 64).

Special Master Kayatta's findings were also based, in part, on testimony from Kansas' own representatives who negotiated the terms of the FSS and Accounting Procedures. Report at 25. Kansas' former Chief Engineer, David Pope, testified to both Special Masters McKusick and Kayatta that the Accounting Procedures were intended to properly carry out the FSS' provisions excluding Imported Water Supply from CBCU. Report at 25. Given that testimony, Special Master McKusick's findings, and the plain meaning of the FSS, there can be no doubt that the States did not intend to treat water imported from the Platte River Basin as if it were virgin water supply.

Nonetheless, Kansas argues that the States understood the impact of the Accounting Procedures on Nebraska's allocation and intended to charge Nebraska for consuming water imported from the Platte River Basin. Kansas Br. at 27-28. That argument directly contradicts the plain language of section I.D. of the FSS. There the States agreed that "this Stipulation and the Proposed Consent Judgment are not intended to, nor could they, change the States' respective rights and obligations under the Compact." Yet, charging Nebraska for consuming imported water would allocate Platte River water – something the Compact does not do – and would reduce Nebraska's share of Republican River water. Charging Nebraska for consuming Platte River water increases Nebraska's CBCU. Report at 35. Nebraska must therefore, decrease its consumption of Republican River water. For example, if Nebraska is charged for consuming 8,000 acre-feet of Platte River water, then it must reduce its consumption of Republican River water by the same amount or risk violating the Compact. In effect, Nebraska's allocation of Republican River water is reduced by the amount of Imported Water Supply for which it is charged. This directly contradicts the States' explicit agreement that the FSS is not intended to – nor could it – change the States' respective rights and obligations under the Compact. FSS § I.D.

C. Testimony by Kansas witnesses confirm the States did not intend to charge Nebraska for consuming imported water.

The Special Master correctly determined the States did not intend to count consumption of Imported Water Supply as if it were virgin water supply. The Compact does not allocate Imported Water Supply. Republican River Compact, art. III. Kansas' former Chief Engineer agreed in 2013 that it was very important to the parties that the FSS and its procedures and models comply as much as scientifically possible with the Compact. Report at 31 (quoting Pope). In fact, the States expressly agreed that the FSS cannot alter the States obligations under the Compact. FSS, § I.D. To that end, the States agreed to exclude Imported Water Supply from CBCU and virgin water supply. FSS, §§ II, IV.F.

Kansas nonetheless argues that the States settled on a different agreement when negotiating the RRCA Accounting Procedures. Kansas argues it negotiated for a bottom-line result based on a balance of "positive" and "negative residuals" that included charging Nebraska for consuming Imported Water Supply. Kansas Br. at 26-29. Kansas' argument is disproved by its failure to raise it in 2007 and its failure to quantify residuals.

Kansas suggested for the first time in August 2013 that the consumption of Imported Water Supply was part of some negotiated balance of "positive" and

"negative" residuals in the Accounting Procedures. It was then Kansas first presented testimony that it would be unfair to remove the "positive" residuals, which include consumption of Imported Water Supply, leaving behind only the "negative" residuals. August 2013 Tr. at 40 (Larson). If Kansas had negotiated for a balance of "positive" and "negative" residuals in the Accounting Procedures, then one would fairly expect Kansas to have made that argument in 2007 when Nebraska first complained that it was being charged for consuming Imported Water Supply.

In 2007, however, Kansas never mentioned that it had bargained for a balance of residuals or that it intended to charge Nebraska for consuming Imported Water Supply. Instead, it took two conflicting positions. Report, app. G at G1-2. First, Kansas took the position that residuals must be eliminated. *Id.* at G1. Nebraska devised a proposal that would eliminate residuals and exclude Imported Water Supply from CBCU and virgin water supply. *Id.* at G2. Kansas rejected that proposal and took the position that neither the FSS nor the Compact requires the States to eliminate residuals. *Id.* at G2. Nothing in the record suggests that in 2007 anyone from the Kansas team thought they had negotiated for a balance of residuals.

To the contrary, the evidence confirms that Kansas could not have negotiated for a balance of "positive" and "negative" residuals. Kansas' testifying expert and member of the Kanas team who negotiated the FSS, Steven Larson, never quantified residuals –

either positive or negative. Tr. at 374 (Larson). Even by 2012, he had not performed any analysis to confirm that Nebraska was being charged for consuming Imported Water Supply. Report at 35. The Special Master describes Mr. Larson's testimony on the point:

> When asked point blank whether he challenged that assertion, he replied "I'm not sure," though he acknowledged that it was possible that Nebraska was being charged for the consumption of imported water supply. He implausibly claimed that in the more than five years during which Nebraska has sought various remedies based on its claim that it was being charged with the consumption of imported water, he has not addressed the assertion directly "because I think it takes a fair amount of model run evaluation to do that; and I haven't been able to do that. "

Report at 36 (quoting Tr. at 374 (Larson)). Without performing the necessary model run evaluation or knowing whether Nebraska was being charged for consuming Imported Water Supply, Mr. Larson could not have been aware of the "resulting impact on Nebraska's allocation." Kansas Brief at 27. Nor could he have known whether the Accounting Procedures "balance out the positive and negative residuals." Kansas Br. at 32. Mr. Larson's professed lack of knowledge demonstrates that Kansas did not intend to charge Nebraska for consuming Imported Water Supply. If Kansas had negotiated for that result, then

Mr. Larson would have been certain whether it was achieved in the Accounting Procedures.

Kansas' failure to argue in 2007 that it intended to charge Nebraska for consuming Imported Water Supply, its failure to quantify residuals, and the testimony of its own witness that the States intended for the Accounting Procedures to comply with the Compact demonstrate that the States did not intend to charge Nebraska for consuming Imported Water Supply. This Court should accept the Special Master's findings on the issue and overrule Kansas' exceptions.

D. The Court should reject Kansas' requests for additional remedies.

1. Injunctive relief is unwarranted.

During hearings before the Special Master, Kansas sought various forms of injunctive relief. It asked the Special Master for an order enjoining further violations, an order shutting down 302,000 acres of land irrigated by groundwater pumping, "preset sanctions" for future violations, and appointment of a River Master. Report at 180. The Special Master recommends this Court deny each of these requests. Report at 180-186. Kansas now objects to the Special Master's recommendation. Colorado opposes Kansas' objections and supports the Special Master's recommendation.

The Special Master correctly recommends against injunctive relief because Kansas failed to prove a

cognizable danger of recurrent violation by Nebraska. Report at 182. His recommendation is supported by his findings, including the following. First, Nebraska reached compliance for the most recent period of record. Report at 116. During that period it used less than its Compact allocation by over 300,000 acre-feet. *Id.* Kansas does not challenge these findings. Second, Kansas' expert witnesses could not state with certainty that Nebraska would violate the Compact in the future. Report 119-120. Third, the modeling projections Kansas uses to argue that Nebraska might violate the Compact in the future rely on faulty assumptions. Report at 120. These findings easily support the Special Master's conclusion that Kansas failed to prove a cognizable danger of recurrent violation by Nebraska.

Despite having failed to prove that injunctive relief is warranted, Kansas argues that the equities favor entering an order to comply. Kansas Br. at 37. Kansas argues that the Special Master's recommendations will not ensure that Nebraska complies with the Compact. Kansas Br. at 43. And it argues against the Special Master's recommendation because "Kansas will have to pursue any future violations by initiating a new breach of Compact action in this Court." *Id.* Kansas claims that "[b]y entering an enforceable order to comply now, the Court would establish a clear path for swift action in the event of any future non-compliance with the Compact and the FSS." *Id.* at 43-44. This argument disregards the States' agreement and the Court's previous decision that its

original jurisdiction is obligatory only in appropriate cases.

First, Kansas' argument disregards the mandatory dispute resolution procedures in the FSS. The FSS requires all disputes over Compact compliance and enforcement of the FSS to be first submitted to the Republican River Compact Administration. FSS § VII.A.1. Section VII describes the procedures for resolving such disputes, including non-binding arbitration. The States agreed that in order to exhaust its administrative remedies, a State must submit a disputed issue to the RRCA and arbitration as provided in section VII. FSS, VII.B.8. The Court should not allow Kansas to bypass these requirements.

Second, Kansas' argument ignores the Court's previous decision that its original jurisdiction is obligatory only in appropriate cases. The Court has original and exclusive jurisdiction over cases and controversies between States. *See* U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. § 1251(a). That jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983). Yet, the Court has determined that its exercise of original jurisdiction is "obligatory only in appropriate cases." *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992). In deciding whether to exercise its jurisdiction, the Court examines "the nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim," and the availability of an alternative forum in which to resolve the issue. *Id.* at

77. Rather than pursuing future violations by initiating a new breach of Compact action, Kansas asks the Court for an order establishing "a clear path for swift action." Kansas Br. at 43-44. Colorado is aware of no authority to support such relief.

2. The Court should limit damages to Kansas' loss.

The Special Master recommends the monetary award should be in the amount of $5.5 million. Report at 179. The amount represents an award for the full amount of Kansas' loss ($3.7 million), plus an additional amount of $1.8 million. *Id.* That additional amount represents a portion of the amount by which Nebraska's gain exceeds Kansas' loss. *Id.* Kansas now asks this Court to award it treble damages in the amount of $11.1 million above Kansas' loss.

Kansas cites several cases in support of its argument for treble damages. Kansas Br. at 57-58. However, none of the cited authorities applies here. For example, *Sedima v. Imrex Co.*, 473 U.S. 479 (1985) involved allegations of racketeering and claims by individuals for treble damages authorized by the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. RICO provides a private civil action to recover treble damages for injury by reason of a violation of its substantive provisions. *Sedima v. Imrex Co.*, 473 U.S. 479, 481 (1985). Similarly, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) involved

allegations of antitrust and claims by individuals for treble damages authorized by the Sherman Act 15 U.S.C. § 1 et seq. None of the cases cited involves disgorgement under a court's equity jurisdiction; and neither statute applies here. Therefore, the Court should overrule Kansas' request for treble damages.

Moreover, damages in this case should be limited to Kansas' loss. Contrary to Kansas' claims, Nebraska's breach of Compact was neither opportunistic nor intentional. *Compare* Kansas Br. at 46 ("Nebraska opportunistically breached the Compact. ") *with* Report at 111, 130 (finding no evidence that Nebraska deliberately opted for noncompliance); 130-31 (Nebraska's efforts to comply preclude a finding that this was a consciously opportunistic breach). For the reasons stated in Colorado's Brief in Support of its Exception to the Report of the Special Master, the Court should limit the award to Kansas' loss.

CONCLUSION

The Court should overrule Kansas' exceptions entirely. The Special Master correctly determined that the States did not intend to treat consumption of Imported Water Supply as if it were the consumption of virgin water supply. The current RRCA Accounting Procedures treat consumption of Imported Water Supply under some circumstances as if it were consumption of virgin water supply. Therefore, the Court should overrule Kansas' exception and accept the

Special Master's recommendation to order the RRCA Accounting Procedures reformed to correct the erroneous treatment of Imported Water Supply.

In addition, the Special Master correctly concluded that Kansas has not proven a cognizable danger of recurrent violation by Nebraska. Therefore, the Court should overrule Kansas' exception and adopt the Special Master's recommendation against injunctive relief.

Last, the Court should overrule Kansas' exception to the amount of the award. Nothing supports Kansas' claim for treble damages in this original action. Furthermore, Nebraska's breach of Compact was neither intentional nor opportunistic. Therefore, the Court should limit damages in this case to Kansas' loss of $3.7 million.

Respectfully submitted this 31st day of March, 2014.

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